TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 107

ROBERT F. NOLAN, ADMINISTRATOR, ET AL.,
PETITIONERS,

vs.

TRANSOCEAN AIR LINES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 27, 1960
CERTIORARI GRANTED JUNE 27, 1960

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Docket Entries

UNITED STATES DISTRICT COURT

Civil Docket 139-342

Jury demand date: by Pltff. 11/7/58

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL individually, and MARJORY M. HALL as Guardian *ad Litem* of JUDITH MARIE HALL, an infant

—vs—

TRANSOCEAN AIR LINES

For plaintiff:

Speiser Quinn & O'Brien (6-9-59)
290 Madison Ave. NY 17

For defendant:

Haight Gardner Poor & Havens
80 Broad St. NY 4

—B—

Nov.	7-58	Filed complaint and issued summons.
Nov.	7-58	Filed Petition & Order for appointment of Guardian Ad Litem. Kaufman, J.
Nov.	13-58	Filed summons & return. Served deft. 11-13-58.
Nov.	28-58	Filed Notice of appearance of attys for deft
Feb.	6-59	Filed ANSWER of deft
Feb.	9-59	Filed Affdvt & Notice of motion for summary judgment. Ret. 2-24-59

Docket Entries

Apr.	Filed Stip. and Order adjourning return date of motion to 5-7-59. Palmieri, J.
May 14-59	Filed Affdvt of Pltff in opposition to motion Re: Summary judgment.
May 14-59	Filed Deft's reply affdvt.
May 14-59	Filed Opinion #25122. Deft's motion for summary judgment is granted. Levet, J. (Clerk's judgment endorsed thereon. Mailed notice of entry 5-14-59.
June 9-59	Filed Notice of change of address & firm name of pltff's attorneys
June 12-59	Filed Notice of Appeal—Mailed copy to Haight Gardner Poor & Havens

(Seal)

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ 139-342

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL individually, and MARJORY M. HALL as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Plaintiffs,

—against—

TRANSOCEAN AIR LINES,

Defendant.

PLAINTIFFS DEMAND A TRIAL BY JURY

Plaintiffs, complaining of the defendant, by their attorneys, Speiser & O'Brien, respectfully show and allege as follows:

For a First Cause of Action on Behalf of Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, Deceased:

1. That heretofore and prior to the commencement of this action and on or about the 18th day of February, 1958, Letters of Administration were duly issued to Robert F. Nolan upon the Estate of Jasper Wallace Hall, deceased, by order of the Probate Court, County of Charleston, State of South Carolina, and that thereafter the said Robert F. Nolan duly qualified as such Administrator, entered upon his duties and is now acting as such.

2. Jurisdiction hereunder is based on diversity of citizenship and amount. Plaintiff Robert F. Nolan is a citizen and resident of the State of New York.

3. Upon information and belief, that at all the times hereinafter mentioned the defendant was and is a corporation incorporated and existing under and by virtue of the laws of the State of California.

4. Upon information and belief, that at all the times hereinafter mentioned the defendant maintained its principal place of business in the State of California.

5. That the amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000) Dollars.

6. That the said defendant is and at all the times hereinafter mentioned was engaged in business and doing business in the Southern District of New York.

7. That the said defendant is and at all the times hereinafter mentioned was a common carrier engaged in the business of transporting passengers for hire by airplane between various points in the United States, including the States of New York and California.

8. Upon information and belief that at all the times hereinafter mentioned the defendant in the conduct of its said business owned a certain DC-4 airplane bearing registration number N88942.

9. Upon information and belief that at all the times hereinafter mentioned the defendant in the conduct of its said business was the lessee of a certain DC-4 airplane bearing registration number N88942.

10. That at all the times hereinafter mentioned the defendant in the conduct of its said business operated said airplane.

11. That at all the times hereinafter mentioned the defendant in the conduct of its said business maintained said airplane.

12. That at all the times hereinafter mentioned the defendant in the conduct of its said business controlled said airplane.

13. Upon information and belief that on or about March 20, 1953, the defendant during the course of its said business

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operated that certain air trip or flight designated as Transocean Air Lines' Flight 942, from Roswell, New Mexico in a westerly direction toward Oakland, California.

14. That on or about March 20, 1953, the defendant operated that certain DC-4 airplane, bearing registration number N88942, under the designation of Transocean Air Lines' Flight 942.

15. That on or about March 20, 1953, the decedent, Jasper Wallace Hall, was a passenger lawfully aboard said defendant's airplane N88942 and designated as Transocean Air Lines Flight 942.

16. Upon information and belief that at all the times hereinafter mentioned, and while said Jasper Wallace Hall was being transported and conveyed as such passenger in said airplane, the said airplane was then and there owned, leased, operated and maintained by and under the exclusive control of the defendant, through one or more of its agents, servants and employees, and that such agents, servants

and employees of the defendant were operating the said airplane in and about the discharge of their duties as such agents, servants and employees, within the scope of their employment and authority as such, and over whom the said Jasper Wallace Hall had no supervision or control.

17. Upon information and belief that while said airplane was owned, leased, operated, maintained and controlled by the defendant as aforesaid, and while the said Jasper Wallace Hall was a passenger on said airplane as aforesaid, the said airplane on March 20, 1953, at or in the vicinity of Alvarado, California, crashed to the ground.

18. That by reason of the foregoing crash, and as a direct result thereof, the said Jasper Wallace Hall sustained injuries as a result of which he died.

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19. That the said crash and death of Jasper Wallace Hall was caused by the negligence of the defendant Transocean Air Lines in the ownership, management, operation, maintenance and control of the aforesaid airplane.

20. That the crash and death of Jasper Wallace Hall was caused without any fault or lack or care on the part of the decedent, Jasper Wallace Hall, contributing thereto in any manner whatsoever.

21. Upon information and belief, that at all the times hereinbefore mentioned, there was extant in the State of California Section 377 of the California Code of Civil Procedure, which provides as follows:

"Wrongful death of adults or certain minors; action by personal representatives; death of wrongdoer; damages; consolidation of actions"

When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his death, his personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 956 of the Civil Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 956 of the Civil Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 956 of the Civil Code, such actions shall be consolidated for trial on the motion of any interested party."

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22. That by reason of the foregoing death of Jasper Wallace Hall he left him surviving as his lawful heirs, his wife, Marjory M. Hall, and his daughter, Judith Marie Hall,

an infant under the age of fourteen years, to wit, the age of five years.

23. That by reason of the foregoing the estate of Jasper Wallace Hall and the next of kin of the said Jasper Wallace Hall have been damaged in the sum of $200,000.00.

As and for a Second Cause of Action on Behalf of Plaintiff, Marjory M. Hall:

24. That on and for some time prior to March 20, 1953, Jasper Wallace Hall and Marjory M. Hall were husband and wife, living together as such, with their domicile and residence in the State of South Carolina.

25. Jurisdiction hereunder is based upon diversity of citizenship and amount. Plaintiff Marjory M. Hall is a citizen and resident of the State of South Carolina.

26. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "3" to "21", both inclusive of this complaint, with the same force and effect as though more fully set forth herein at length.

27. That by reason of the foregoing death of Jasper Wallace Hall, caused as aforesaid, he left him surviving as a lawful heir, his wife, Marjory M. Hall.

28. That the aforesaid death of Jasper Wallace Hall, caused as aforesaid, occurred without any fault or lack of care on the part of plaintiff Marjory M. Hall, contributing thereto in any manner whatsoever.

29. That as the result of the death of Jasper Wallace Hall, caused as aforesaid, the said Marjory M. Hall was caused to suffer the loss of his society and companionship,

his love and affection, and his services and support, all to her damage in the sum of $200,000.00.

Complaint

For a Third Cause of Action on Behalf of the Infant Plaintiff Judith Marie Hall, by Her Guardian Ad Litem Marjory M. Hall:

30. That heretofore and prior to the commencement of the action, this Court duly appointed Marjory M. Hall as Guardian ad Litem of Judith Marie Hall, an infant under the age of 14 years, to wit, the age of five years, for the purpose of commencing and maintaining the within action.

31. That on March 20, 1953, and at all times prior to the death of Jasper Wallace Hall, as hereinbefore and hereinafter alleged, the infant Judith Marie Hall was the daughter of said Jasper Wallace Hall, living with and being supported and provided for by said Jasper Wallace Hall.

32. That jurisdiction hereunder is based upon diversity of citizenship, and amount, the guardian ad litem Marjory M. Hall and the infant Judith Marie Hall both being residents of the State of South Carolina.

33. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "3" through "21", both inclusive of this complaint with the same force and effect as though more fully set forth herein at length.

34. That by reason of the foregoing death of Jasper Wallace Hall, caused as aforesaid, he left him surviving as a lawful heir, his daughter, Judith Marie Hall.

35. That the aforesaid death of Jasper Wallace Hall, caused as aforesaid, occurred without any fault or lack of care on the part of plaintiff Judith Marie Hall, contributing thereto in any manner whatsoever.

36. That as the result of the death of Jasper Wallace

Hall, caused as aforesaid, the said infant Judith Marie Hall,

was caused to suffer the loss of his society and companionship, his love and affection, and his support of said infant, all to her damage in the sum of $200,000.00.

For a Fourth Cause of Action on Behalf of Plaintiff Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, Deceased:

37. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "1" through "18", both inclusive of this complaint, with the same force and effect as though more fully set forth herein at length.

38. Upon information and belief that heretofore and on or before March 20, 1953, the defendant, by an authorized officer or agent thereof, entered into an agreement with the United States Government, or an authorized agency thereof, for a good and valuable consideration, for the transportation by air of various persons including plaintiff's intestate, Jasper Wallace Hall, from a point in the State of New Mexico to a point in the State of California.

39. Upon information and belief that on or about March 20, 1953, and pursuant to and by direction of the orders and directives of the United States Government, the plaintiff's intestate, Jasper Wallace Hall, entered the aforesaid airplane provided by defendant for the aforesaid purpose, and became a passenger lawfully thereon.

40. That one of the conditions of the aforesaid agreement was that the defendant would provide safe passage for the persons on board said airplane, including plaintiff's intestate Jasper Wallace Hall.

41. That plaintiff's intestate was one of the intended beneficiaries of the conditions and benefits of said agreement.

42. That by reason of the foregoing the defendant breached its aforesaid agreement to provide safe passage to plaintiff's intestate, Jasper Wallace Hall.

43. That the plaintiff's intestate Jasper Wallace Hall and the United States Government performed all the terms and conditions of the aforesaid agreement on their part to be performed.

44. That by reason of the foregoing the estate of Jasper Wallace Hall and the next of kin of the said Jasper Wallace Hall all have been damaged in the sum of $200,000.00.

WHEREFORE, the plaintiff Robert F. Nolan demands judgment against the defendant on the first cause of action in the sum of $200,000.00 and on the fourth cause of action in the sum of $200,000.00; the plaintiff Marjory M. Hall demands judgment against the defendant on the second cause of action in the sum of $200,000.00; and the infant plaintiff Judith Marie Hall demands judgment against the defendant on the third cause of action in the sum of $200,000.00, together with the costs and disbursements of each cause of action.

SPEISER & O'BRIEN

By EDWARD O'BRIEN
Member of the firm
Attorneys for Plaintiffs
Office & P. O. Address
501 Fifth Avenue
New York 17, N. Y.

Answer

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, Transocean Air Lines, by its attorneys, Haight, Gardner, Poor & Havens, answering the complaint herein:

As to the First Alleged Cause of Action:

I. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 1, 2, 5, 15, 20, and 22 of the complaint herein.

II. Upon information and belief denies each and every allegation contained in paragraphs 10, 11, and 12 of the complaint except that it admits and alleges that at all the times hereinafter mentioned, the defendant, in the conduct of its said business, operated, maintained and controlled the said airplane subject to the rules, regulations and directions of the Civil Aeronautics Administration, the Civil Aeronautics Board and other governmental agencies having jurisdiction over air carriers.

III. Upon information and belief denies each and every allegation contained in paragraph 16 of the complaint except that it admits that at all times hereinafter mentioned and while Jasper Wallace Hall was being transported

and conveyed in said airplane, the said airplane was then being leased, operated, maintained and controlled by the defendant, subject to the rules, regulations and directions of the Civil Aeronautics Administration, the Civil Aeronautics Board and other governmental agencies having jurisdiction over air carriers, through its agents, servants and employees and that such agents, servants and employees of the defendant were operating the said airplane in and about the discharge of their duties as such agents, servants and employees within the scope of their employment and authority as such.

IV. Upon information and belief denies each and every allegation contained in paragraph 17 of the complaint except that it admits that while the said Jasper Wallace Hall was a passenger on said airplane, the said airplane was involved in an accident on March 20, 1953, in the vicinity of Alvarado, California.

V. Upon information and belief denies each and every allegation contained in paragraphs 8, 19, and 23 of the complaint.

As to the Second Alleged Cause of Action:

VI. Denies that it has knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 24, 25, and 27 of the complaint.

VII. Answering the allegations of paragraph 26 of the complaint, defendant repeats and realleges its admissions and denials to paragraphs "3" to "21" of the complaint with

the same force and effect as though they were set forth herein at length.

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VIII. Upon information and belief denies each and every allegation contained in paragraph 29 of the complaint.

As to the Third Alleged Cause of Action:

IX. Denies that it has knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 30, 31, 32, 34, and 35 of the complaint.

X. Answering the allegations of paragraph 33 of the complaint, defendant repeats and realleges its admissions and denials to paragraphs 3 to 31 of the complaint with the same force and effect as though they were set forth herein at length.

XI. Upon information and belief denies each and every allegation contained in paragraph 36 of the complaint herein.

As to the Fourth Alleged Cause of Action:

XII. Answering the allegations of paragraph 37 of the complaint defendant repeats and realleges its admissions and denials to paragraphs 1 through 18 of the complaint with the same force and effect as though they were set forth herein at length.

XIII. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 38, 39, 41, and 43 of the complaint herein, except

that it admits that defendant, pursuant to an agreement with the United States Government, agreed to provide passage for certain persons, designated by the United States Government, from New Mexico to California.

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XIV. Upon information and belief denies each and every allegation contained in paragraph 40 of the complaint except that it admits that defendant, pursuant to an agreement with the United States Government, agreed to provide passage for certain persons designated by the United States Government on board the said airplane.

XV. Upon information and belief denies each and every allegation contained in paragraphs 42 and 44 of the complaint herein.

First Separate Defense to All Causes of Action in the Complaint:

XVI. The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Separate Defense to All Causes of Action in the Complaint:

XVII. The right of action set forth in the complaint arose in the State of California and accrued more than one year prior to the commencement of this action. This action is, therefore, barred by the California statute of limitations.

Answer

Third Separate Defense to All Causes of Action in the Complaint:

XVIII. Neither the decedent, nor decedent's next of kin, nor the defendant, was at the time of the commencement of this action domiciled within the State of New York or the Southern District of New York; none of the matters in connection with which this action is alleged to have arisen took place within the State of New York, or within the territorial jurisdiction of the Southern District of New

York. Transocean Air Lines, therefore, objects to the maintenance of this action against it within the Southern District of New York and requests the court to decline jurisdiction of this action.

WHEREFORE, defendant, Transocean Air Lines demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

HAIGHT, GARDNER, POOR & HAVENS

By WILLIAM J. JUNKERMAN

A Member of the Firm

Attorneys for the Defendant

80 Broad Street

New York 4, N. Y.

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Notice of Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. No. 139-342

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of William J. Junkerman, Esq., sworn to the 6th day of February, 1959, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a stated term for the hearing of motions to be held at Room 506 of the United States Court House, Foley Square, New York, New York, on the 24th day of February, 1959, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment in favor of the defendant and against the plaintiffs upon the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law for the reason that this action is barred by the California Statute of Limitations, and for such other and further relief as to the Court may seem just and proper.

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PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, must be served 5 days before the return date of this motion.

Notice of Motion

Dated: New York, New York
February 6, 1959.

HAIGHT, GARDNER, POOR & HAVENS
By WILLIAM J. JUNKERMAN
A member of the firm
Attorneys for Defendant
80 Broad Street
New York 4, N. Y.

To:

SPEISER & O'BRIEN, ESQS.
Attorneys for Plaintiffs
501 Fifth Avenue
New York 17, N. Y.

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Affidavit of William J. Junkerman in Support of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. No. 139-342

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WILLIAM J. JUNKERMAN, being duly sworn, deposes and says:

I am an attorney-at-law and a member of the firm of Haight, Gardner, Poor & Havens, attorneys for the defendant in the above-entitled action. I make this affidavit in support of defendant's motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for an order granting summary judgment to the defendant and against plaintiffs upon the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law for the reason that this action is time barred by the applicable statute of limitations.

This is an action to recover damages for the alleged wrongful death of Jasper Wallace Hall, who died in an airplane accident in the vicinity of Alvarado, in the State of California, on March 20, 1953. The compiaint was filed in this court on November 7, 1958.

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The complaint sets forth four alleged causes of action. The first cause of action is brought on behalf of Robert F. Nolan, as Administrator of the Estate of Jasper Wallace

Hall, Deceased, and alleges that the said Robert F. Nolan was issued letters of administration on the 18th day of February, 1958, that jurisdiction of the court is based on diversity of citizenship, that the decedent met his death as a result of the alleged negligent operation, management and control of a certain airplane by the defendant which resulted in an accident occurring on March 20, 1953, in the State of California, and that the decedent left him surviving as his lawful heirs, his wife, Marjory M. Hall, and his daughter, Judith Marie Hall, an infant of the age of five years, and that by reason of defendant's negligence the estate of the decedent and the next of kin were damaged in the sum of $200,000.

The second cause of action is brought by Marjory M. Hall, individually, on her own behalf as wife and next of kin of the decedent, and repeats and realleges essentially the same allegations concerning the alleged negligence and liability of the defendant as is alleged in the first cause of action.

The third cause of action is brought by Marjory M. Hall, as Guardian ad Litem of the infant plaintiff, Judith Marie Hall. In this cause of action it is alleged that this court appointed Marjory M. Hall as Guardian ad Litem of Judith Marie Hall for the purpose of maintaining this action, that on March 20, 1953, and prior thereto, the infant Judith Marie Hall was the daughter of the decedent, who was living with and being supported by him, and that as a result of the alleged wrongful death of the decedent, the infant

lost the society, companionship and support of the decedent and was damaged thereby.

The fourth cause of action is brought by the plaintiff, Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, Deceased, and alleges generally that the de-

cedent was being transported on defendant's aircraft pursuant to an agreement between the United States Government and the defendant, and that one of the conditions of the agreement was that the defendant would provide safe passage for the decedent and that the decedent was one of the intended beneficiaries of the said agreement, and that the defendant breached its agreement to provide safe passage to the decedent, as a result of which his estate and next of kin were damaged in the amount of $200,000.

Defendant's answer denies generally the material allegations of the complaint as to negligence and liability and sets forth three separate defenses. The first separate defense alleges that the complaint fails to state a claim against the defendant upon which relief can be granted. The second separate defense, which is the basis of this motion, alleges that the right of action set forth in the complaint arose in the State of California and occurred more than one year prior to the commencement of this action and is therefore barred by the applicable statute of limitations. The third separate defense is that of *forum non conveniens*, the defendant claiming that since neither the decedent nor the decedent's next of kin, nor the defendant, were domiciled within the State of New York at the time of the commencement of the action, and since none of the matters in connection with which this action is alleged to have arisen took place within the State of New York, the defendant objects to the maintenance of this action against it within the Southern District of New York.

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The filed pleadings will be submitted to the court upon the hearing of this motion.

Upon information and belief, the plaintiff Marjory M. Hall was born in Charleston, South Carolina, on November

17, 1936, and was married to decedent Jasper Wallace Hall, in the latter part of the year 1951.

All of the occupants of the airplane described in the complaint were killed immediately in the accident on March 20, 1953, and any cause of action for plaintiffs' decedent's wrongful death accrued on that date.

Section 377 of the California Code of Civil Procedure, which is the applicable wrongful death statute of the State of California, is quoted in full in paragraph 21 of plaintiffs' complaint.

Paragraph 3 of Section 340 of the California Code of Civil Procedure requires that such a wrongful death action be brought within one year. That paragraph reads as follows:

"TIME OF COMMENCING CIVIL ACTIONS".

* * * * *

"§340. [Within one year.] Within one year:

* * * * *

3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositer against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Business and Professions Code Section 4826, for such person's neglect resulting in injury or death to an animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl;

* * * * *"

Affidavit of William J. Junkerman in Support of Motion

Plaintiffs' action in the case at bar did not comply with the California statute since the complaint herein was not filed in this court until November 7, 1958.

WHEREFORE, deponent respectfully requests an order granting summary judgment in favor of the defendant and against the plaintiffs dismissing the complaint herein for the reason that the action is barred by the California statute of limitations.

WILLIAM J. JUNKERMAN

(Sworn to February 6, 1959.)

Affidavit of Edward M. O'Brien in Opposition to Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil No. 139-342

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

EDWARD M. O'BRIEN, being duly sworn, deposes and says:

I am an attorney-at-law and a member of the firm of Speiser & O'Brien, attorneys for the plaintiffs herein. I make this affidavit in opposition to defendant's motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for an order granting summary judgment to the defendant and against the plaintiffs.

The within action is one to recover damages for the wrongful death of Jasper Wallace Hall, who was killed while riding as a passenger on defendant's aircraft. The aircraft crashed in the vicinity of Alvarado, California on March 20, 1953.

Plaintiffs commenced the action by filing their complaint with the Court on November 7, 1958. Plaintiffs' actions are brought pursuant to the wrongful death act of Califonia, (California Code of Civil Procedure, Section 377) which is set forth in paragraph 21 of plaintiffs' complaint.

The only ground stated in defendant's supporting papers for seeking summary judgment is that the within action was commenced more than one year after the expiration of the period of limitation set forth in Sec. 340(3) of the Cali-

fornia Code of Civil Procedure. Defendant quotes this paragraph and section on page four of its supporting affidavit.

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Assuming for the purpose of this argument that the defendant is correct in its assumption that this action is controlled by the California period of limitation, the defendant's motion must be denied because both the widow and daughter of the decedent were under the disability of infancy at the time of his death and at the time of the commencement of the within action.

Marjory M. Hall, the widow of the decedent, was born on November 17, 1936, in Charleston, South Carolina; a verified copy of her birth certificate is attached hereto. Judith Marie Hall, the daughter of the decedent, was born December 2, 1952, in Roswell, New Mexico. The decedent was born on March 21, 1934, in Augusta, Georgia. The decedent and his wife were married on December 26, 1951, in Berkeley, South Carolina. The decedent met his death in defendant's aircraft in California on March 20, 1953. The within action was commenced by the filing of the complaint in this Court on November 7, 1958. Deponent bases these dates on information received from the attorney representing the decedent's estate in Charleston, S. C.

It can readily be determined therefore, that Marjory M. Hall was approximately sixteen and one-half years old at the time of her husband's death; and her daughter was three months old at such time. Mrs. Hall became 21 years of age on November 17, 1957, and the within action was commenced before the date of her twenty-second birthday.

Since it is the law of the forum which determines matters of exceptions, that is, facts which toll the statute of limitations, *Van Dyke* v. *Parker*, 83 F. 2d 35 (C. A. 9th 1936);

53 C. J. S. Limitations of Actions, Sec. 27, it is necessary to examine the law of New York in order to determine whether the disability of infancy tolled the period of limitation for commencing this action.

Section 60 of the N. Y. Civil Practice Act provides:

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"§60. EXTENSION OF TIME TO COMMENCE ACTION IN CONSEQUENCE OF CERTAIN DISABILITIES. If a person entitled to maintain an action other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, is at the time when the cause of action accrues, either:

1. Within the age of twenty-one years;

• • • • •

"... and if the time otherwise limited in this article for commencing the action is five years or more and if such time, expires before the disability ceases, or less than five years thereafter, the time otherwise limited shall be extended in consequence of such disability so as to permit the action to be commenced after the expiration of the time otherwise limited but not more than five years after the disability ceases; but if the time otherwise limited is less than five years, such time shall be extended by the period of disability; ..."

Under this section the least amount of time plaintiffs had in which to commence this was within one year after the disability of infancy ceased.

Mrs. Hall did not become 21 years of age until November 17, 1957. Under Sec. 60 she had at least until November 17, 1958, within which to commence the action. The action was commenced November 7, 1958, ten days before the shortest

possible extension period, that could conceivably be applicable to the within action, expired.

It is clear that even under a one year period of limitation the action is not barred because it was commenced within the shortest possible extension of time allowed by Section 60 after Mrs. Hall became 21 years of age.

This would be true even if the California tolling provisions could be applied instead of the *lex fori*. This is shown by a reading of Section 352 of the California Code of Civil Procedure, which provides:

"§352. Disabilities of Minority, Insanity, Imprisonment, and Marriage; Effect on Limitation Period Exception, as to Persons Under Disabilities. If a person entitled to bring an action, mentioned in Chapter 3 of this Title, be, at the time the cause of action accrued, either:

1. Within the age of majority; or

* * * * *

. . . The time of such disability is not a part of the time limited for the commencement of the action."

Even under California law the limitation period selected by the defendant as controlling would not commence to run until Mrs. Hall became 21. After reaching 21, she would then have to commence her action within one year after November 17, 1957; it was commenced on November 7, 1958.

It is readily apparent then that both the *lex fori* and the *lex loci* toll the period of limitation relied on by the defendant as controlling the within action. It is therefore respectfully submitted that under either the law of New York or the law of California, the plaintiffs had at the minimum

a period of one year in which to commence the action after the disability of infancy was removed from Mrs. Hall on November 17, 1957, by reason of her 21st birthday. Since the action was commenced within one year after the disability of infancy was removed the defendant's contention that the action is barred is groundless and its motion must be denied.

WHEREFORE, it is respectfully requested that an order be entered denying defendant's motion for summary judgment in all respects, and for such other and further relief as the Court deems proper.

EDWARD M. O'BRIEN

(Sworn to May 6, 1959.)

MARGIN RESERVED FOR BINDING
WRITE PLAINLY WITH UNFADING INK—THIS IS A PERMANENT RECORD

STANDARD CERTIFICATE OF LIVE BIRTH

Registration Dist. No. 9a
Registrar's No. 175-1743
Division of Vital Statistics—State Board of Health
State of South Carolina
Federal Security Agency
Public Health Service
Reg. No. 139

1 PLACE OF BIRTH
a County: Charleston
b City or town (If outside corporate limits, write RURAL): Charleston
c Full name of hospital or institution (If not in hospital or institution, give street address or location): 151 Wentworth St.

2 Usual Residence of Mother (Where does mother live?)
a State: S.C.
b County: Charleston
c City or town (If outside corporate limits, write RURAL): Charleston
d Street address (If rural, give location): 151 Wentworth St.

3 Child's name (Type or Print): Marjory Marie Poston
4 Sex: female
5a This birth: Single ☒ Twin ☐ Triplet ☐
5b If twin or triplet (This child born): 1st ☐ 2nd ☐ 3rd ☐
6 Date of birth (Month) (Day) (Year): Nov. 17, 1936

FATHER OF CHILD
7 Full name: Leon Poston
8 Age (at time of this birth): 29 Years
9 Birthplace (State or foreign country): Georgetown, S.C.
10a Usual occupation: Electrician Helper
10b Kind of business or industry:
11 Color or race: White

MOTHER OF CHILD
12 Full maiden name: Odell Douglas
13 Age (at time of this birth): 24 Years
14 Birthplace (State or foreign country): Charleston, S.C.
15 Children previously born to this mother: (a) Now many OTHER children are now living? 3 (b) How many OTHER ones were born but are now dead? 0 (c) How many children were born alive but other than reported in (a) and (b) (Do not include this child)? 0
16 Color or race: White

17 I have reviewed the information on this, my child's birth certificate, and find it to be correct.
(Signature of Mother)

18 I hereby certify that this child was born alive on the date stated above at 1:00 A.M.
18a Signature of attendant: J.H. Buell, M.D.
18b Address: Roper Hospital
18c Attendant at birth: M.D. ☐ Midwife ☐ Other (Specify)
18d Date signed

19 Date rec'd by Local Registrar: Dec. 3, 1936
20 Registrar's signature: Leon Banov, M.D.
21 Date on which given name added
By (Registrar)

Attest: The above is a true and legal copy of the facts contained in the original certificate filed in the records of the Charleston County Health Department, Charleston, S. C.

SEAL

JUL 18 1958
Date

Leon Banov M.D.
Local Registrar District 9A

VERIFICATION OF BIRTH

THIS IS TO CERTIFY that there is on file at the DEPARTMENT OF HEALTH, Charleston, S. C., a record of the birth of

NAME OF CHILD: Marjory Marie Poston REG. NO. 175-1743

DATE OF BIRTH: November 17, 1936 SEX: Female RACE: White

PLACE OF BIRTH: 151 Wentworth St.

MAIDEN NAME OF MOTHER: Odell Douglas

NAME OF FATHER: Leon Poston

LEON BANOV, M.D., DIRECTOR

BY Leon Banov M.D. JUL 18 1958
DIRECTOR

DEPARTMENT OF HEALTH
CHARLESTON, S. C.

FEE FOR CERTIFIED RECORD - $1.00 NO FEE FOR THIS VERIFICATION

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Reply Affidavit of William J. Junkerman in Support of Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WILLIAM J. JUNKERMAN, being duly sworn, deposes and says:

I make this affidavit in reply to plaintiffs' attorney's affidavit in opposition to defendant's motion for summary judgment.

In his affidavit, sworn to the 6th day of May, 1959, Mr. O'Brien refers to Section 60 of the New York Civil Practice Act and contends that that section would toll the running of the Statute of Limitations until November 17, 1958. However, Section 60 of the Civil Practice Act and the cases cited in Mr. O'Brien's affidavit have no application to the situation in the case at bar. This Court in *Moore, et al.* v. *Roschen, et al.*, 93 F. Supp. 993 (U. S. D. C. S. D. N. Y.) (1950) held that Section 60 was inapplicable under an almost identical situation.

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Plaintiffs' affidavit also cites a brief part of Section 352 of the California Code of Civil Procedure to support their position. In doing so they failed to disclose that Section 25 of the California Civil Code provides that under California law a married woman reaches her majority at the age of 18 years. That section reads as follows:

Reply Affidavit of William J. Junkerman in Support of Motion

"§25. [Minors, who are: Construction of section: Married female deemed adult: Effect of subsequent judgment of annulment.] Minors are all persons under 21 years of age; provided, that this section shall be subject to the provisions of the titles of this code on marriage and shall not be construed as repealing or limiting the provisions of Section 204 of this code; provided, further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract, the same as if she was 21 years of age. Subsequent judgment of annulment of such marriage shall not deprive such female person of her adult status once attained under the foregoing provision, unless such judgment is obtained in an action commenced prior to her reaching the age of 18 years, in which latter event she shall be deemed to have remained a minor at all times notwithstanding such marriage."

(Subsequent amendments to this section in 1953 and 1955 giving a married person, 18 years of age or over, the right as an adult person to maintain or defend an action affecting his marital status, have no bearing on the question involved here.)

Reply Affidavit of William J. Junkerman in Support of Motion

The leading decisions interpreting Section 25 are set forth in defendant's memorandum of law, submitted herewith. It is respectfully submitted that they show clearly that this action was barred one year following the 18th birthday

of Marjory M. Hall. Marjory M. Hall, having been born on November 17, 1936, her 18th birthday was on November 17, 1954 and the action was barred on November 17, 1955.

WHEREFORE, deponent respectfully requests that its motion be, in all respects, granted.

WILLIAM J. JUNKERMAN

(Sworn to May 6, 1959.)

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Opinion of Levet, *D.J.*

The defendant, Transocean Air Lines, has moved for summary judgment in its favor upon the ground that it is entitled to judgment as a matter of law for the reason that the action is barred by the California Statute of Limitations.

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The action seeks recovery of damages for the allegedly wrongful death of Jasper Wallace Hall in an airplane accident in the Vicinity of Alvarado, in the State of California, on March 20, 1953. The complaint was filed in this court on November 7, 1958.

The complaint sets forth four alleged causes of action. The first cause of action is brought on behalf of Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, deceased, and alleges that the said Robert F. Nolan was issued letters of administration on the 18th day of February, 1958, that jurisdiction of the court is based on diversity of citizenship, that the decedent met his death as a result of the alleged negligent operation, management and control of a certain airplane by the defendant which resulted in an accident occurring on March 20, 1953, in the State of California, and that the decedent left him surviving, as his lawful heirs, his wife, Marjory M. Hall, and his daughter, Judith Marie Hall, an infant of the age of 5 years, and that by reason of defendant's negligence the estate of the decedent and the next of kin were damaged in the sum of $200,000.

The second cause of action is brought by Marjory M. Hall, individually, on her own behalf as wife and next of kin of the deceased, and repeats and realleges essentially the same allegations concerning the alleged negligence and liability of the defendant as is alleged in the first cause of action.

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The third cause of action is brought by Marjory M. Hall, as Guardian ad Litem of the infant-plaintiff, Judith Marie Hall. In this cause of action it is alleged that this court appointed Marjory M. Hall as Guardian ad Litem of Judith Marie Hall for the purpose of maintaining this action, that on March 20, 1953, and prior thereto, the infant, Judith Marie Hall, was the daughter of the decedent, who was living with and being supported by him, and that as a result of the alleged wrongful death of the decedent the infant lost the society, companionship and support of the decedent and was damaged thereby.

The fourth cause of action is brought by Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, deceased, and alleges generally that the decedent was being transported on defendant's aircraft pursuant to an agreement between the United States Government and the defendant, and that one of the conditions of the agreement was that the defendant would provide safe passage for the decedent and that the decedent was one of the intended beneficiaries of the said agreement, and that the defendant breached its agreement to provide safe passage to the decedent, as a result of which his estate and next of kin were damaged in the amount of $200,000.

The facts involved here are as follows:

1. The widow, Marjory M. Hall, was born November 17, 1936.

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2. The decedent, Jasper Wallace Hall, was born March 2, 1934.

3. The marriage took place on December 26, 1951, in South Carolina.

4. Judith Marie Hall, the child of this couple, was born December 2, 1952.

5. The death of Jasper Wallace Hall took place on March 20, 1953.

6. The widow reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957.

7. The administrator was appointed on February 18, 1958.

8. The action was commenced in this court on November 7, 1958.

9. The widow is a resident of Charleston, South Carolina.

The California Wrongful Death Statute, upon which this action is predicated, allows suit by the heirs or personal representatives of decedent. (Section 377 of the California Code of Civil Procedure). Under California law, such an action must be commenced within one year from the dece-

dent's death. Section 340, subd. 3, California Code of Civil Procedure; Marks v. Reissinger, 35 Cal. App. 44, 169 P. 243 (1917). However, the statute is tolled during the minority of the person entitled to sue. Section 352 of the California Code of Civil Procedure.

Section 25 of the California Civil Code reads in part as follows:

> "Minor are all persons under 21 years of age; • • • provided further, that any person who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the

second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or his estate, or for the purpose of entering into any contract, or for the purpose of maintaining or defending an action affecting his marital status, including therein any action or proceeding involving his support or the support or custody of children of the marriage, or determination of property rights, the same as if he were 21 years of age. • • • "

Defendant's argument in support of its motion may be summarized as follows:

1. The one-year California statute of limitations for the bringing of a wrongful death action is applicable here.

2. By virtue of Section 25 of the California Civil Code, Marjory M. Hall, the widow, attained her majority on November 17, 1954, her eighteenth birthday.

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3. This action became time-barred on November 17, 1955, one year after Marjory M. Hall reached her eighteenth birthday.

4. The action of the daughter, Judith Marie Hall, became barred at the same time as that of the widow.

The plaintiffs, in opposition to this motion, contend:

1. That the law of the forum, New York, determines the tolling of the statute of limitations due to infancy and that, therefore, the statute did not commence to run until November 17, 1957, when Marjory M. Hall reached the age of 21. (See New York Civil Practice Act, Section 60)

2. That even under the California statutes, the running of the statute of limitations would not commence until Mrs. Hall became 21.

3. That even if the widow's action is time-barred, the action of the daughter is not.

While the California courts have interpreted the one-year statute of limitations on wrongful death actions to be procedural rather than an inherent part of the right to recovery (see Wohlgemuth v. Meyer, 139 Cal. App. 2d 326, 293 P. 2d 816, 818 (1956)), the one-year California statute is clearly applicable here by reason of Section 13 of the New York Civil Practice Act, which reads in part as follows:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon *the* cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. • • • "

In applying the California statute of limitations, this court must apply all of its "accouterments," including its tolling provisions and its rules on infancy. See American Surety Company of New York v. Gainfort, 2 Cir., 1955, 219 F. 2d 111, 112; Moore v. Reschen, D. C. S. D. N. Y. 1950, 93 F. Supp. 993, 994.

In the Moore case, supra, Section 60 of the New York Civil Practice Act, tolling the running of the statute of

limitations during certain disabilities including infancy, was held to be inapplicable to an action brought in this court by a non-resident infant-plaintiff for personal injuries sustained in Pennsylvania. In granting a motion for summary judgment, the court concluded that the infant-plaintiff's cause of action was barred under the Pennsylvania statute of limitations and that Section 60 of the New York Civil Practice Act could not enlarge the time prescribed by Pennsylvania, where the cause of action arose.

Similarly, in the case at bar, if, as the defendant contends, this action would be time-barred in California, where the cause of action arose, it is time-barred in New York as well.

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The pertinent law with respect to the one-year California statute of limitations may be recapitulated as follows:

1. A woman who lawfully marries prior to the age of 18 attains her majority upon reaching that age. California Code, Section 25.

2. An action on behalf of a widow for the wrongful death of her husband must be commenced within one year after her attaining majority. Haro v. Southern Pac. R. Co., 17 Cal. App. 2d 594, 62 P. 2d 441 (1936); see also Caraway v. Burns, 143 Cal. App. 2d 327, 299 P. 2d 689 (1956).

3. An action which is time-barred as to the widow is also time-barred as to infant offspring of the decedent. Haro v. Southern Pac. R. Co., supra; Sears v. Majors, 104 Cal. App. 60, 285 P. 321 (1930). (For similar reasons the causes of action of the administrator herein would also appear to be barred.)

It is clear from the foregoing that under California law, Marjory M. Hall attained her majority on November 17,

1954, when she became 18, and that her cause of action and that of Judith Marie Hall for the death of Jasper Wallace Hall became time-barred on November 17, 1955.

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Plaintiffs' contention that the California courts would not apply Section 25 of the California Code to time-bar an action brought by a non-resident, in my opinion, lacks merit. Such a rule might in effect prefer non-residents by permitting them to obtain recoveries in the California courts on claims which under the same circumstances would be outlawed to California residents. The case of Deason v. Jones, 7 Cal. App. 2d 482, 45 P. 2d 1025 (1935), cited by the plaintiffs, does not support their position. There, the court applied the California infancy rule to bar recovery on a contract entered into by the defendant in California even though previously, while residing in Oklahoma, he had obtained a court decree from that state declaring him to have attained majority for the purpose of transacting business.

Since this action is barred by the applicable statute of limitations, the defendant's motion for summary judgment must be granted.

So ordered.

Dated: New York, N. Y.
May 14, 1959.

RICHARD H. LEVET
United States District Judge

Judgment entered May 14, 1959.

HERBERT A. CHARLSON,
Clerk.

Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil No. 139-342

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that Robert F. Nolan, Administrator of the Estate of Jasper Wallace Hall, deceased, Marjory M. Hall individually, and Marjory M. Hall as Guardian ad Litem of Judith Marie Hall, an infant, hereby appeal to the United States Court of Appeals for the Second Circuit, from an Order of Honorable Richard H. Levet, United States District Judge for the Southern District of New York, dated May 14, 1959, granting summary judgment to the defendant Transocean Air Lines and dismissing the Complaint in this action.

Dated: New York, N. Y.
June 11, 1959

SPEISER, QUINN & O'BRIEN
Attorneys for Plaintiffs-Appellants
By EDWARD M. O'BRIEN
Office & P. O. Address
290 Madison Avenue
New York 17, N. Y.

Notice of Appeal

To:

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
80 Broad Street
New York, N. Y.

Clerk, United States District Court
Southern District of New York
United States Court House
Foley Square
New York 17, N. Y.

[fol. 42]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—October Term, 1959

Argued January 5, 1960

Docket No. 25779

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL individually, and MARJORY M. HALL as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Plaintiffs-Appellants,

—v.—

TRANSOCEAN AIR LINES,

Defendant-Appellee.

Before: Lumbard, Chief Judge, Moore and Friendly, Circuit Judges.

Appeal from judgment of the District Court for the Southern District of New York, Richard H. Levet, *Judge*, 173 F. Supp. 114, granting defendant's motion for summary judgment based on the statute of limitations. Affirmed.

Robert A. Dwyer, New York, N. Y. (Stuart M. Speiser and Speiser, Quinn & O'Brien, New York, N. Y. on the brief), for Appellants.

[fol. 43] William J. Junkerman, New York, N. Y. (Maurice L. Noyer and Haight, Gardner, Poor & Havens, New York, N. Y. on the brief), for Defendant-Appellee.

OPINION—March 2, 1960

Friendly, Circuit Judge:

Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think

the California courts would think on an issue about which neither has thought. They have had no occasion to do so. But life, here coupled with death, casts up new problems, and the court seised of the case is obliged, as best it can, itself to blaze the trail of the foreign law that it has been directed to follow.

The action was brought in the Southern District of New York for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane operated by defendant. The plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow appointed by the District Court as guardian *ad litem* of her minor child. The administrator alleged two causes of action; the widow alleged one on her own behalf and another as guardian *ad litem*. The jurisdiction of the District Court was predicated on diversity of citizenship, the administrator being a resident of New York and the widow and infant residents of South Carolina and the defendant a corporation organized and maintaining its principal place of business in California. The administrator, although appointed in another state, was a proper party plaintiff, Fed. R. Civ. Proc. 17 (b); N. Y. Decedent Estate Law §160.

Defendant moved for summary judgment on the ground that the action was barred as a result of incorporation of [fol. 44] the California period of limitations by the "borrowing" provision of the New York statute of limitations, New York Civil Practice Act, §13. Judge Levet granted the motion (173 F. Supp. 114), and plaintiffs appeal from the judgment of dismissal. We affirm.

Section 13 of the New York Civil Practice Act provides, so far as here pertinent:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. * * *"

The causes of action here asserted arose in California, by virtue of Section 377 of the Code of Civil Procedure of that state, providing that when the death of a person "is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." Paragraph 3 of §340 of the Code of Civil Procedure requires that numerous categories of actions, including actions for wrongful death, be brought within one year.[1] Section 352 [fol. 45] of the Code of Civil Procedure provides that if a person entitled to bring an action be a minor when the cause of action accrued, "The time of such disability is not a part of the time limited for the commencement of the action."

California's provisions as to what constitutes minority are found in §25 of its Civil Code. This reads in part as follows:

> "Minors are all person under 21 years of age; * * * provided further, that any person who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or his estate, or for the purpose of entering into any contract, or for the purpose of maintaining or defending an

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[1] The District Judge held and the parties do not dispute that §340(3) of the California Code of Civil Procedure is a true statute of limitations going only to the remedy, rather than, as is more often the case with death statutes, American Law Institute, Restatement of Conflict of Laws §397, a substantive provision affecting the right. Such authority as exists supports this. See *Gregory* v. *Southern Pacific Co.*, 157 Fed. 113 (C. C. D. Ore. 1907); *cf. Zellmer* v. *Acme Brewing Co.*, 184 F. 2d 940 (9th Cir. 1950); *Wohlgemuth* v. *Meyer*, 139 Cal. App. 2d 326, 293 P. 2d 816, 818 (1956). This result would also follow under the test of "specificity" adopted in *Bournias* v. *Atlantic Maritime Co.*, 220 F. 2d 152 (2d Cir. 1955).

> action affecting his marital status, including therein any action or proceeding involving his support or the support or custody of children of the marriage, or determination of property rights, the same as if he were 21 years of age. * * * "

In contrast, under the law of South Carolina, where the Halls resided, all persons remain minors until they attain the age of 21. South Carolina Code, Volume 1, §10-104 (1).

The death occurred on March 20, 1953. Mrs. Hall, who had been married in South Carolina shortly after becoming 15, reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957. The action was begun on November 7, 1958.

(1) Despite the New York residence of the administrator, appellants argued the case, both in the District [fol. 46] Court and before us, on the assumption that it fell within the general rule of §13 of the New York Civil Practice Act and not within the exception "that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply."[2] Nevertheless, because of the serious consequences of affirmance, we have considered whether the case comes within the exception, in which event the administrator might prevail unless the California rule, stated below in our discussion of the child's cause of action, is a part of the cause of action rather than of California's statute of limitations. We conclude it does not. While we have found no authority on the point, we do not believe the courts of New York would permit the policy embodied in §13 of the Civil Practice Act against opening the courts of that state to suits by non-residents on foreign causes of action that were time-barred in the state creating them, to be overcome by the appointment of a resident of New York as administrator

[2] We have held that "the time limited by the laws of" New York for a foreign wrongful death, where the limitation of the foreign state is procedural and not substantive, is the six years provided by C. P. A. §48(2) for actions on a statute. *Janes* v. *Sackman Bros. Co.*, 177 F. 2d 928 (2d Cir. 1949).

of a non-resident's estate.[3] Since the administrator is thus subject to the California statute of limitations as the widow and child clearly are, his cause of action would seem barred by the rule referred to, even if California would compute [fol. 47] the one year for his bringing suit as running only from his appointment rather than from Hall's death.

(2) We turn therefore to the cause of action asserted by the widow.

In applying §13 of the Civil Practice Act, the New York courts would take into account not only the one-year limitation of California applicable to actions for wrongful death but "all its accouterments" including the provision tolling the statute during minority. *American Surety Company of New York* v. *Gainfort*, 219 F. 2d 111 (2d Cir. 1955). The disputed question is how the New York courts would think the California courts would determine the duration of Mrs. Hall's minority. Defendant contends and the District Court held that California would apply Section 25 of its Civil Code despite Mrs. Hall's South Carolina residence and that accordingly her time to bring the action in California ceased on November 17, 1955, when she became 19.[4] Appellants assert the California conflict of laws rule would require the California courts to look to the law of South

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[3] In holding this we have not overlooked the rule, established in *Chappedelaine* v. *Dechenaux*, 8 U. S. (4 Cranch) 306, 308 (1808), "that the federal courts have jurisdiction of suits by and against executors and administrators if their citizenship be diverse from that of the opposing party, although their testators or intestates might not have been entitled to sue or been liable to suit in those courts for want of diversity of citizenship." *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U. S. 183, 186 (1931).

[4] We note in passing that §25 of the California Civil Code makes the attaining of adulthood by a female at 18 dependent upon her having contracted "a lawful marriage." Mrs. Hall was 15 and her husband 17 at the date of their marriage in South Carolina. However, South Carolina, to whose law California would look to determine the validity of the marriage, follows the common law rule permitting males to marry at 14 and females at 12; the ages for licensed marriages with parental consent are 18 for males and 14 for females but absence of a license does not render the marriage illegal. *State* v. *Ward*, 204 S. C. 210, 28 S. E. 2d 785 (1944).

Carolina, where Mrs. Hall had always resided, to ascertain the duration of her minority.

The parties have cited no authorities determinative of this question and we have found none. Appellants rely on *Deason* v. *Jones*, 7 Cal. App. 2d 482, 45 Pac. 2d 1025 (1935), and *Emery* v. *Emery*, 45 Cal. 2d 421, 289 Pac. 2d [fol. 48] 218 (1955). In *Deason* v. *Jones*, the defendant, originally domiciled in Oklahoma, had obtained a decree in that state authorizing him to transact business with the same effect as if he had attained majority. He subsequently came to California and, before attaining 21, entered into a contract that he then sought to disaffirm. The Court held he might do so despite the Oklahoma decree. Appellants rely on a statement that "the status of all persons within a state is exclusively a matter for that state to determine for itself." However, the Court followed this by saying that "in the exercise of a well-established right the legislature of this state has made its own provisions respecting the contractual rights and obligations of minors. Those provisions were controlling with respect to the contract which was made in this state, and the respondent had acquired no status which exempted him therefrom." Since the Court gave effect to the California statute on minority, even as to one who had previously acquired majority for contracting purposes under the law of his domicile, the case seems more favorable to appellee than to appellants. In *Emery* v. *Emery*, Mrs. Emery and two daughters, residents of California, sued Mr. Emery in that state for injuries they had suffered in Idaho in a car driven by the Emery son. The Court held "that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile" and consequently applied California law. While this is apparently a departure from the rule followed in most states, and one urged by eminent authors, Cheatham and Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959, 974-75 (1952), it has little bearing on what law California would choose to determine the ending of minority for the purpose of bringing suit in its courts. The provision in Fed. R. Civ. Proc. 17 (b) that "The [fol. 49] capacity of an individual, other than one acting in

a representative capacity, to sue or be sued shall be determined by the law of his domicile," also relied on by appellants, likewise does not assist in determining to what law the California courts would look in deciding when Mrs. Hall first became entitled to sue in California in her own right.

Despite general statements that matters of status are regulated by the law of the domicile, the courts seem rather to determine capacity to act by applying the law of the state deemed to have the most significant connection with the act.[5] Thus capacity to transfer title to property is governed by the law of the *situs*, and this whether the property be real or personal. American Law Institute, Restatement of the Conflict of Laws, §§216, 255.[5] The much discussed case of *Milliken* v. *Pratt*, 125 Mass. 374 (1878), held the capacity of a married woman to contract was to be determined by the law of Maine where the contract was made rather than by the law of Massachusetts where she was domiciled. This rule was adopted in the Restatement, §333.[6] Indeed, the Restatement applies the law of the place of making to determine capacity to enter into the most "status" forming of all contracts—marriage, §121 (e) 5 and illustration 3, although Dean Griswold thinks this may be only a short-hand way of subsuming a reference to the "whole law" [fol. 50] of the domicile including its conflict of laws and a further reference by the law of the domicile in most cases to the law of the place of contracting. Griswold, *Renvoi Revisited*, 51 Harv. L. Rev. 1165, 1199 (1938). See *In re May's Estate*, 305 N. Y. 486, 114 N. E. 2d 4 (1953).

Inherent in the conflict of laws rules just reviewed is a desire that all acts with consequences in a state shall have the same consequences regardless of the identity of the actors. This policy would seem peculiarly applicable to

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[5] Restatement of the Conflict of Laws Second, Tentative Draft No. 5, is still to this effect, although the comments (§216 and §254a) have been altered so that the reference to the law of the *situs* includes its conflict of laws.

[6] A perceptive critic, who regards the rule of the Restatement as an oversimplification, agrees that "a return to the rule, rejected by Mr. Justice Gray, that the contractual capacity of a person is governed by the law of the domicile, is not a satisfactory solution." Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Methods*, 25 U. Chi. L. Rev. 227, 248 (1958).

a determination of majority incident to the application of a statute of limitations, a matter that has long been recognized as one for the forum. The question here, like so many conflicts questions today, is one of statutory construction—did the California legislature intend §25 of the Civil Code to apply only to Californians or to persons acting with respect to California whether Californians or not? We think the latter, at least so far as concerns the age at which a person is deemed sufficiently mature to control litigation in California courts. When the California legislature considered that its own brides of 18 had sufficient responsibility to conduct suits in California on their own account, it would hardly demand a greater age of a South Carolina bride to do the same—just as it would scarcely have wished to permit a South Carolina bride of 14 to sue in California's courts in her own name if South Carolina should have thought its females as precocious for suing as for marrying. This is preeminently a case where California would desire to apply to all suitors the law "of the forum, with which the lawyers and judges are more familiar and which can be administered more conveniently," *Bournias* v. *Atlantic Maritime Co., supra,* at 154.

Appellants argue that, under this holding, §13 of the Civil Practice Act abridges Mrs. Hall's privileges and immunities as a citizen of the United States in violation of Article IV, §2, of the Federal Constitution, *McKenett* v. [fol. 51] *St. Louis-San Francisco Ry.*, 292 U. S. 230 (1934). Recognizing that *Canadian Northern Ry.* v. *Eggen*, 252 U. S. 553 (1920) forecloses constitutional attack on §13 on the general basis that the statute limits non-residents to a shorter period than residents for bringing suit, they say that, in contrast to the complainant in the *Canadian Northern* case, Mrs. Hall never had an opportunity to sue in New York, because §236 of the Civil Practice Act prevented her from suing in her own name until she became 21 and by that time §13, as the District Judge applied it, had closed the doors. However, Mrs. Hall could have maintained an action in New York at any time by a guardian *ad litem*. Civil Practice Act §§201-06. and §201 states expressly that the rights of an infant to maintain an action "shall not be deferred or delayed on account of his infancy." It is of

no moment from a constitutional standpoint that a New York widow of the same age would have had the added privilege of awaiting majority and bringing suit in her own name within the period provided by C. P. A. §60. For, as said in *Canadian Northern Ry.* v. *Eggen*, *supra*, at 562, the constitutional requirement is satisfied "if the nonresident is given access to the courts of the state upon terms which, in themselves, are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens."

(3) We come finally to the cause of action asserted on behalf of the minor daughter. If this stood alone, neither the California nor the New York statute of limitations would be an obstacle, since both were tolled by infancy. The barrier lies in another California rule, namely the holding that §377 of its Code of Civil Procedure creates a single joint cause of action for wrongful death and that if limitation has barred the action as to an adult parent, [fol. 52] the action is also barred as to a minor infant, *Sears* v. *Major*, 104 Cal. App. 60, 285 P. 321 (1930); *Haro* v. *Southern Pacific R. Co.*, 17 Cal. App. 2d 594, 62 P. 2d 441 (1936). Appellants claim these cases to be inconsistent in theory with more recent decisions, *Secrest* v. *Pacific Electric Ry.*, 60 Cal. App. 2d 746, 141 P. 2d 747 (1943); *Flores* v. *Brown*, 39 Cal. App. 2d 622, 248 P. 2d 922 (1952) and *Perkins* v. *Robertson*, 140 Cal. App. 2d 536, 295 P. 2d 972 (1956), that a bar against recovery by one heir because of contributory negligence does not preclude recovery by others. It is not for us to say whether the two lines of cases are logically reconcilable. For Judge Levet was surely right in thinking the New York courts would not refuse to follow California decisions that are directly in point simply because of other decisions of courts of the same level that are alleged to be inconsistent with but in no way reflect on the pertinent authorities.

Judgment affirmed.

[fol. 53]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Circuit Judges.

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL individually, and MARJORY M. HALL as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Plaintiffs-Appellants,

—v.—

TRANSOCEAN AIR LINES,

Defendant-Appellee.

JUDGMENT—March 2, 1960

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 54] [File endorsement omitted]

[fol. 55] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 56]

SUPREME COURT OF THE UNITED STATES

No. 963, October Term, 1959

ROBERT F. NOLAN, Administrator, et al., Petitioners,

vs.

TRANSOCEAN AIR LINES.

ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.